

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
GALLATIN RIVER BASIN (41H)
PRELIMINARY DECREE

* * * * *

CLAIMANTS: Lazy J. Ranches Limited Partnership; Harry L.
Leachman III

CASE: 41H-0179-R-2021
41H 136662-00
41H 136717-00
41H 148471-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above-stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

FINDINGS OF FACT

1. Matthew K. Adams, Heather Widlund, and the Schwing Family Opportunity Fund V, LLC (Adams, Widlund, and Schwing) are the record co-owners of claim 41H 136585-00; Lazy J Ranches Limited Partnership (Lazy J) is the record owner

of claims 41H 136662-00, 41H 13666-00, 41H 136713-00, and 41H 136717-00; and Harry L. Leachman III (Leachman) is the record owner of claim 41H 148471-00.

2. Claims 41H 136662-00, 41H 136717-00, and 41H 148471-00 were decreed with the following DNRC issue remark that remains unresolved:

THE TYPE OF HISTORICAL RIGHT, PRIORITY DATE, AND FLOW RATE MAY BE QUESTIONABLE. THE CLAIMS FOLLOWING THIS STATEMENT USE THE SAME FILED APPROPRIATION TO DOCUMENT THE RIGHT. THE COMBINED FLOW RATE FOR THIS GROUP OF CLAIMS EXCEEDS THE TOTAL OF THE ORIGINAL APPROPRIATION. 41H 136662-00, 41G 136717-00, 41H 148471-00.

Claims 41H 136585-00, 41H 136666-00, and 41H 136713-00 were decreed with the following DNRC issue remark that remains unresolved:

THE TYPE OF HISTORICAL RIGHT, PRIORITY DATE, AND FLOW RATE MAY BE QUESTIONABLE. THE CLAIMS FOLLOWING THIS STATEMENT USE THE SAME FILED APPROPRIATION TO DOCUMENT THE RIGHT. THE COMBINED FLOW RATE FOR THIS GROUP OF CLAIMS EXCEEDS THE TOTAL OF THE ORIGINAL APPROPRIATION. 41H 136666-00, 41H 136713-00, 41H 136585-00.

Notice-type issue remarks were decreed on most of the claims and do not require further proceedings.

3. No objections were filed, and the claims were consolidated into Case 41H-0179-R-2021.

4. As requested by Adams, Widlund, and Schwing, a Scheduling Order was issued on February 8, 2022. (Doc.¹14.00).

5. On April 22, 2022, Adams, Widlund, and Schwing filed a Motion to Amend claim 41H 136585-00 proposing the following changes be made:

Priority Date: ~~JUNE 1, 1900~~ **AUGUST 10, 1900**
Type of Historical Right: ~~FILED~~ **USE**

(Doc. 16.00). The Motion to Amend intended to address the over-filed notice of appropriation issue remark decreed on claims 41H 136585-00, 41H 136666-00, and 41H 136713-00.

6. On June 30, 2022, Leachman and Lazy J filed a Stipulation and Agreement (Stipulation). (Doc. 17.00). The parties to the June 30, 2022 Stipulation agreed claim 41H 148471-00 should be changed as follows:

¹ “Doc.” numerical references correlate to case file docket numbers in the Water Court’s Full Court case management system.

Type of Historical Right: FILED **USE**

Point of Diversion and Means of Diversion:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	NENENE	NWSESE	17 9	1S	7E	GALLATIN

*Period of Diversion: MAY 1 TO OCTOBER 1

Diversion Means: **HEADGATE** **PUMP**

Ditch Name: CARTER DITCH

*Place of Use:

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	8.00	NENE	N2SENE	17	1S	7E	GALLATIN
Total:	8.00						

Additionally, the parties stipulated that a supplemental rights remark should be placed on claim 41H 148471-00.

The Stipulation intended to address the over-filed notice of appropriation issue remark decreed on claims 41H 136662-00, 41H 136717-00, and 41H 148471-00.

7. An Order Denying Motion and Order Rejecting Stipulation was issued on July 12, 2022. (Doc. 18.00).

Regarding claim 41H 136585-00, the Order explained that no evidence was filed with the April 22, 2022 Motion; and the over-filed notice of appropriation issue remark decreed on claims 41H 136585-00, 41H 136666-00, and 41H 136713-00 remains unresolved.

Regarding claim 41H 148471-00, the Order explained that no evidence was provided supporting an independent basis for claim 41H 148471-00 to be recognized as a use right June 27, 1887 priority date. The only evidence before the court was the Notices of Appropriation that were attached to the Statement of Claim. Further complicating matters, the parties to the Stipulation proposed changes that were not on the Objection List. Additionally, no maps were provided showing the newly proposed legal land descriptions. Finally, this Master does not place supplemental rights remarks on claims – all supplemental rights remarks will be removed from claims during preparation for final decrees.

8. A Status Conference was conducted on August 8, 2022 and this Water Master explained the additional evidence needed and explained that supplemental rights remarks will not be added to claims.

9. On September 9, 2022, Adams, Widlund, and Schwing filed a Brief in Support of the Motion to Amend Claim 41H 136585-00. (Doc. 25.00). The September 9, 2022 Filing explains that claims 41H 136585-00, 41H 136666-00, and 41H 136713-00 are all based on the 200.00 miner's inch Peter Brenden Pine Creek (previously called Stone Creek) right with a June 1, 1899 priority date. The June 1, 1899 Peter Brendan Notice of Appropriation was filed on August 10, 1900. A ditch use agreement dated December 20, 1904 was attached to the 41H 136585-00 Statement of Claim; the ditch use agreement was between Y.J. Kuinders and Charles J. Esgar; Exhibit F, attached to the September 9, 2022 Filing shows Adams, Widlund, and Schwing are predecessors-in-interest to Esgar. Additionally, the legal description of the ditch described in this agreement diverting water from Stone Creek is the same as the description of the ditch in the Brendan Notice.

10. An Order Setting Filing Deadline for Proposed Prehearing Orders for claims 41H 136662-00, 41H 136717-00, and 41H 148471-00 was issued on October 24, 2022 setting a November 18, 2022 deadline for settlement documents for a joint proposed prehearing order. (Doc. 28.00).

11. On November 18, 2022, Leachman and Lazy J filed a Revised Stipulation Agreement (Revised Stipulation) and Brief in Support of the Stipulation. (Doc. 29.00). The Revised Stipulation proposed the following changes to claim 41H 148471-00:

Type of Historical Right: FILED USE

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD FLOOD/SPRINKLER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	NENENE	NWSESE	17	9	1S	7E GALLATIN

*Period of Diversion: MAY 1 TO OCTOBER 1

Diversion Means: HEADGATE PUMP

~~Ditch Name:~~ CARTER DITCH

*Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	8.00	NENE	N2SENE	17	1S	7E	GALLATIN
Total:	8.00						

12. Again, the parties failed to provide an independent basis to support a use right for claim 41H 148471-00 with a June 27, 1887 priority date as proposed in the Stipulation. According to the November 18, 2022 Stipulation:

L. WHEREAS, the Parties recognize and agree that the overclaimed appropriation issue remark appearing on the Leachman Right and the Lazy J Rights has been resolved because Leachman's Claim No. 41H 148471-00 is based on the August 1, 1882, Perkins/Stone Notice, but will be reduced to a "use" right with a priority date of June 27, 1887, which is different from and junior to the August 1, 1882, priority date of Lazy J's "filed" Claim Nos. 41H 136662-00 and 41H 136717-00

The August 1, 1882 Perkins/Stone Notice of Appropriation is the evidence supporting claims 41H 136662-00 and 41H 136717-00. No evidence was provided to support the described use right.

Additionally, the Revised Stipulation noted that the claimed point of diversion for claim 41H 148471-00 in the NWSESE of Section 9, was abandoned "in favor of an on-stream pump located downstream from the original point of diversion." No information was provided regarding when the abandonment and change took place; no map for the point of diversion in the NENENE of Section 17 was provided.

13. Another Order Setting Deadline for Proposed Prehearing Order was issued. (Doc. 31.00).

14. On February 24, 2023, Leachman and Lazy J filed a Supplemental Brief in Support of the Revised Stipulation. (Doc. 34.00) Leachman and Lazy J argue that the August 1, 1882 Perkins/Stone Notice of Appropriation substantiates the June 27, 1887 priority date for claim 41H 148471-00 and it "is sufficient to establish that water was put to beneficial use on the place of use." Furthermore, Leachman and Lazy J argued that it is improper for this Water Master to place an evidentiary burden on the Claimants, inconsistent with Montana Law.

15. Claims 41H 136585-00, 41H 136666-00, and 41H 136713-00 were removed from Case 41H-0179-R-2021 and consolidated into Case 41H-0279-R-2023 on March 15, 2023. (Doc. 35.00).

16. An Order Rejecting [Revised] Stipulation was issued on March 17, 2023. (Doc. 37.00). The March 17, 2023 Order stated, in part:

As claimed, claim 41H 148471-00 has prima facie status pursuant to § 85-2-227, MCA. Water Right Adjudication Rule 17(c) provides that a claimant may agree to reduce or limit an element of a claim without further presentation unless there is an unresolved issue remark on the claim.

Little evidence has been provided to support a different basis for claim 41H 148471-00 other than the August 1, 1882 Perkins/Stone Notice of Appropriation that was attached to the Statement of Claim. In the February 24, 2023 Filing, Leachman and Lazy J point to the Affidavit of James Taylor who mentions knowledge of a ditch “south of Stone Creek that irrigated 20.5 acres near School Gulch.” Mr. Taylor appears to have knowledge as early as the 1960s. (Doc. 34.00, Exhibit B) Additionally, the parties indicate the stipulated point of diversion in the NENENE of Section 17, Township 1 South, Range 7 East, Gallatin County was established on June 1, 1965. The parties have not filed sufficient evidence supporting an 1887 use right.

In the February 24, 2023 Filing, the parties did address this Water Master’s concerns regarding providing notice for the point diversion modification and they did provide a map, although the map does not appear to reflect an 8.00 acre place of use.

17. On May 19, 2023, Leachman filed a Stipulation and Agreement (May 19, 2023 Stipulation). (Doc. 40.00). According to the May 19, 2023 Stipulation:

...the parties have revised the agreement to alter the date of Leachman's modified "use" right to a date which can be supported by evidence that is presently in the claims' files, as acknowledged in the Court's previous order denying this agreement.

18. The May 19, 2023 Stipulation involves claims 41H 136662-00, 41H 136717-00, and 41H 148471-00 – the three remaining claims in the Case, and Lazy J and Leachman – the two remaining parties in the Case.

19. The May 19, 2023 Stipulation indicates no changes should be made to Lazy J’s claims 41H 136662-00 and 41H 136717-00.

The May 19, 2023 Stipulation proposed claim 41H 148471-00 be modified to a June 1, 1965 “use” right with the following point of diversion and means of diversion:

Point of Diversion and Means of Diversion:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County	
1	NENENE	NWSESE	17	9	1S	7E	GALLATIN
*Period of Diversion:		MAY 1 TO OCTOBER 1					
Diversion Means:		HEADGATE PUMP					
Ditch Name:		CARTER DITCH					

20. While evidence was submitted showing that a pump site was established for claim 41H 148472-00 (not in this Case) in the NENENE of Section 17, Township 1 South, Range 7 East, Gallatin County on June 1, 1965, it was unclear when Carter Ditch was abandoned in favor of the pump site in the NENENE of Section 17 as to claim 41H 148471-00. The May 19, 2023 Stipulation appeared to contemplate prospective abandonment of the claimed point of diversion:

M. WHEREAS, the parties agree that pursuant to this Agreement and in recognition of best management practices and conservation of the State's water resources that the ditch and point of diversion originally used to appropriate water for the Leachman's Right in NWSESE Sec 9 T1S R7E Gallatin County will be abandoned in favor of an on-stream pump located downstream from the original point of diversion, and that this agreement is intended to serve as Leachman's written consent under Mont. Code Ann. § 70-17-112(3) that as the holder of the ditch easement he consents to any future encroachment and impairment by Lazy J of the ditch easement he has abandoned.

More information was needed, including evidence of when the change was made, and a deadline was set for Leachman to file evidence showing when the point of diversion in the NENENE of Section 17, Township 1 South, Range 7 East, Gallatin County was first used for claim 41H 148471-00. (Doc. 41.00). The Order stated that if nothing were filed by the June 22, 2023 deadline, this Water Master would conclude that Leachman has no additional evidence and a Master's Report would be issued based on the present record.

Nothing was filed by the deadline.

21. Based on the record, and without additional information from the parties, it appears the following changes should be made to claim 41H 1484171-00 to reflect the historical use of the claim:

Priority Date:	JUNE 27, 1887 JUNE 1, 1965
Type of Historical Right:	FILED USE
Purpose (Use):	IRRIGATION
Irrigation Type:	FLOOD SPRINKLER

Point of Diversion and Means of Diversion:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	NENENE	NWSESE	17 9	1S	7E	GALLATIN

*Period of Diversion: MAY 1 TO OCTOBER 1

Diversion Means: HEADGATE PUMP

Ditch Name: CARTER DITCH

*Place of Use:

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	8.00	NENE	N2SENE	17	1S	7E	GALLATIN
Total:	8.00						

PRINCIPLES AND CONCLUSIONS OF LAW

1. The Water Court has exclusive jurisdiction to determine existing water rights in the State of Montana. *Fellows v. Saylor*, 2016 MT 45, ¶ 25, 382 Mont. 298, 307, 367 P.3d 732, 738.
2. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie validity may be overcome by evidence showing that one or more elements of the claim are incorrect. This standard of proof applies to objectors or claimants objecting to their own water right claims. Rule 19, W.R.Adj.R., *Nelson v. Brooks*, 2014 MT 120; 375 Mont.86, 95; 329 P.3d 558, 564.
3. Section 85-2-248(2), MCA requires the Water Court to resolve all issue remarks that are not resolved through the objection process. The Montana Water Court has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. § 85-2-248(3), MCA.
4. When resolving issue remarks, the Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

5. The Water Court is not bound by settlement agreements. Settlement agreements are subject to review and approval of the Water Court. Rule 17, W.R.Adj.R.

6. The notice-type remarks decreed on claims 41H 136662-00 and 41H 136717-00 have served their purpose. As no objections were filed, the remarks can be removed.

7. Under Section 3-7-224, MCA the Water Court is directed to conduct hearings in the same manner as for other civil actions. The Water Court applies the Montana Rules of Civil Procedure (M.R.Civ.P.), the Montana Rules of Evidence (M.R.Evid.) and the Montana Uniform District Court Rules. This Master considers stipulations filed with the Court as “other paper” under M.R.Civ.P. Rule 11(b)(3) which certifies that to the best of the parties’ knowledge the factual contentions contained within the stipulation are supported by evidence.

Add to this rule the recognition that “the heart of a judicial process is the development of the truth through conflict between parties with adverse interests.” *United States of America (USDI) –Bureau of Indian Affairs)-General Objection to Basin 42B and 42C Preliminary Decrees*, Case 42B-1, ¶ 3 at p. 14, (*Order Denying Motion* June 27, 2014). Considering these tenets, significant weight is given to Stipulations to establish the historical use of claims.

RECOMMENDATIONS

1. Claim 41H 148471-00 should be modified as shown in Finding of Fact No. 21.

2. The issue remarks should be removed from claims 41H 136662-00, 41H 136717-00, and 41H 148471-00.

Post Decree Abstracts of Water Right Claims are served with the Report for review.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service Via Electronic Mail:

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POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
GALLATIN RIVER
BASIN 41H

Water Right Number: 41H 136662-00 STATEMENT OF CLAIM
Version: 5 -- POST DECREE
Status: ACTIVE

Owners: LAZY J RANCHES LIMITED PARTNERSHIP
PO BOX 55287
HOUSTON, TX 77255 5287

Priority Date: AUGUST 1, 1882

Type of Historical Right: FILED

Purpose (use): IRRIGATION
Irrigation Type: SPRINKLER

***Flow Rate:** 12.50 CFS

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 99.00

Source Name: STONE CREEK
Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>	
1		NWSWSE	9	1S	7E	GALLATIN	
*Period of Diversion: APRIL 1 TO OCTOBER 31							
Diversion Means: PUMP/HEADGATE W/DITCH OR PIPELINE							
2		NESESW	9	1S	7E	GALLATIN	
*Period of Diversion: APRIL 1 TO OCTOBER 31							
Diversion Means: PUMP/HEADGATE W/DITCH OR PIPELINE							
*Period of Use: APRIL 1 TO OCTOBER 31							
*Place of Use:							
<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	23.00		E2E2SE	8	1S	7E	GALLATIN
2	76.00		SW	9	1S	7E	GALLATIN
Total:	99.00						

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

136662-00 136717-00

FILE REFLECTS AUTHORIZATION TO CHANGE POINT OF DIVERSION COMPLETED 06/08/1983.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
GALLATIN RIVER
BASIN 41H**

Water Right Number: 41H 136717-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: LAZY J RANCHES LIMITED PARTNERSHIP
PO BOX 55287
HOUSTON, TX 77255 5287

Priority Date: AUGUST 1, 1882

Type of Historical Right: FILED

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

***Source Name:** STONE CREEK
Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		S2	9	1S	7E	GALLATIN
Period of Diversion: MAY 1 TO NOVEMBER 1						
Diversion Means: LIVESTOCK DIRECT FROM SOURCE						
2		NW	16	1S	7E	GALLATIN
Period of Diversion: MAY 1 TO NOVEMBER 1						
Diversion Means: LIVESTOCK DIRECT FROM SOURCE						
Period of Use: MAY 1 TO NOVEMBER 1						

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			S2	9	1S	7E	GALLATIN
2			NW	16	1S	7E	GALLATIN

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

136662-00 136717-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
GALLATIN RIVER
BASIN 41H**

Water Right Number: 41H 148471-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: HARRY L LEACHMAN III
11330 BRIDGER CANYON RD
BOZEMAN, MT 59715

Priority Date: JUNE 1, 1965

Type of Historical Right: USE

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER

Flow Rate: 170.54 GPM

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

***Maximum Acres:** 8.00

Source Name: STONE CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NENENE	17	1S	7E	GALLATIN

***Period of Diversion:** MAY 1 TO OCTOBER 1

Diversion Means: PUMP

***Period of Use:** MAY 1 TO OCTOBER 1

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	8.00		NENE	17	1S	7E	GALLATIN
Total:	8.00						